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No. 08-21

IN THE

# Supreme Court of the United States

AGRI PROCESSOR CO., INC.,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether this Court's 1984 ruling in *Sure-Tan, Inc. v. National Labor Relations Board*, that illegal immigrants are "employees" for purposes of the National Labor Relations Act and are qualified to vote in union elections should be overruled, reconsidered or modified in light of Congress' 1986 enactment of a law that made it a criminal offense to hire undocumented aliens and required the immediate termination of their employment.

## CORPORATE DISCLOSURE STATEMENT

Agri Processor Co., Inc., has no parent corporation. No publicly held company owns 10% or more of the stock of the corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES

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No. 07-

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AGRI PROCESSOR CO., INC.
*Petitioner,*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The majority, concurring, and dissenting opinions in the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-29a) are reported at 514 F.3d 1 (D.C. Cir. 2008). The decision of the National Labor Relations Board (Pet. App. 30a-39a) is reported at 347 NLRB No. 107 (2006).

## JURISDICTION

The Court of Appeals' decision was issued on January 4, 2008. A timely petition for rehearing and petition for rehearing en banc was denied on April 1, 2008. Pet App. 40a-42a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3), provides as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Sections (a)(1) and (a)(2) of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, as amended, provide as follows:

**§ 1324a. Unlawful employment of aliens**

**(a) Making employment of unauthorized aliens unlawful.**

(1) In general. It is unlawful for a person or other entity--

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act [29 USCS § 1802], to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b).

(2) Continuing employment. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

## STATEMENT

Petitioner ("Agri") is a New York corporation engaged in the wholesale sale and distribution of kosher meat products (JA 8-9).[1] Agri has slaughtering and processing plants in Postville, Iowa, and a warehouse in Brooklyn, New York. This case concerns the Brooklyn warehouse, which employs approximately twenty production and maintenance employees (JA 7-9).

Following organizing efforts and the filing of a petition for certification by Local 342 of the United Food and Commercial Workers Union ("the Union") an election was held in the morning of September 23, 2005, in the warehouse's locker room (JA 9). The election produced a 15-to-5 vote (with one challenged ballot) in favor of the Union (JA 8-10).

Agri filed objections to the election. The NLRB's Regional Director denied some of Agri's objections and conducted a hearing on three objections (JA 15-16, 28-51). At the hearing held on November 29, 2005, Agri offered to prove that it had discovered that of the 21 workers who voted in the election, the Social Security numbers of only four matched Social Security records with the same names. Of the remaining 17, either (a) their names did not match the Social Security numbers the voting workers had provided or (b) the Social Security numbers provided by the workers were not in the Social Security Administration's records (JA 143-165).

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[1] "JA" represents the Joint Appendix filed in the Court of Appeals.

Agri requested that on this ground, *inter alia*, the election be voided because 17 votes were cast by illegal immigrants whose employment is unlawful and must be immediately terminated under the Immigration Reform and Control Act of 1986 ("IRCA"). The Administrative Law Judge rejected Agri's contention on the ground that the National Labor Relations Board had held in *Concrete Form Walls, Inc.*, 346 NLRB No. 80 (2006), *enforced, National Labor Relations Board v. Concrete Form Walls, Inc.*, Nos. 06-13845, 06-14997225, 2007 WL 1469039 (11th Cir. May 22, 2007), that "undocumented aliens" are "valid voters in a Board election" (JA 112).

Agri refused to bargain with the Union, which filed a complaint with the NLRB. A panel of the NLRB held that even if the Agri employees were in the United States illegally and Agri "would be required to discharge [them] under the Immigration Reform and Control Act," the undocumented aliens are "employees" within the "broad definition" of that term in Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3) (JA 110-113).

By a 2-to-1 vote (Circuit Judge Kavanaugh dissenting), a panel of the Court of Appeals enforced the NLRB decision on the ground that the result was required "by the [National Labor Relations] Act's plain language and the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)." Pet. App. 3a, *infra*. The majority opinion emphasized the fact that in enacting IRCA Congress did not explicitly repeal the definition of "employee" in the NLRA, and the majority relied on the proposition

that repeals by implication are disfavored. Pet. App. 6a, *infra*.

In a brief concurring opinion, Judge Henderson observed that the result was "somewhat peculiar," but she said that "we must follow *Sure-Tan*'s interpretation **until the Supreme Court otherwise directs** or the Congress expressly limits the term's scope." Pet. App. 18a, *infra* (emphasis added). Judge Kavanaugh dissented because he concluded that the explicit premise of this Court's *Sure-Tan* decision, issued in 1984, was that employment of illegal immigrant workers was not unlawful, and this premise was altered in 1986 when Congress passed IRCA and made it a criminal violation for an employer knowingly to hire an undocumented alien and required the immediate termination of such employment.

Agri filed a timely petition for rehearing and for rehearing en banc. The petition was denied. Circuit Judges Randolph, Sentelle and Kavanaugh noted that they would grant rehearing en banc. Pet. App. 41a, *infra*.

## REASONS FOR GRANTING THE WRIT

### I.

### NATIONAL POLICY REGARDING ILLEGAL IMMIGRANTS IS VERY DIFFERENT IN 2008 THAN IT WAS IN 1984 WHEN *SURE-TAN* WAS DECIDED

Almost a quarter century has elapsed since this Court issued a 7-to-2 decision in the *Sure-Tan* case. The attitude of federal and local laws towards illegal immigrant workers has undergone a sea-change during that period. According to the Pew Hispanic Center, the estimated number of illegal immigrants in the United States increased from 3.3 million in 1982 to 11.1 million in 2005. The annual increase is estimated to be between 500,000 and 850,000 per year.

After highly publicized debates, the Congress failed in 2007 to enact the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 (S. 1348, 110th Cong.). Local and state governments have, however, enacted stringent laws prohibiting the hiring of undocumented aliens. The National Conference of State Legislatures reported that 18 States passed 57 immigration laws in 2007, and the American Civil Liberties Union has reported that 25 cities and counties have taken similar actions this past year. "Local Laws Target Immigration Ills," USA Today, July 11, 2007.

The validity of an election such as the one petitioner has challenged – in which 17 of 21 voters were illegal immigrants who may not lawfully be

employed in the United States – should not be judged by the more tolerant standards of federal and local law that governed in 1984 when this Court decided the *Sure-Tan* case. The Court should reconsider the central legal issue and interpret the National Labor Relations Act in light of today's laws and today's public policies as expressed in federal and local statutes.

## II.

## THIS COURT HAS OVERRULED PRECEDENTS CONSTRUING FEDERAL STATUTES WHEN THE PRECEDENTS ARE INCONSISTENT WITH CURRENT NATIONAL POLICIES

This Court has been willing to overrule an earlier decision interpreting a federal statute or announcing a common-law rule when the earlier decision is shown to be inconsistent with changing national policy goals expressed in later statutes or in later judicial opinions. For example, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), this Court overruled the statutory construction it had given to a provision of the Norris-LaGuardia Act in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), decided only 17 years earlier, on the ground that "subsequent events have undermined its continuing validity." 398 U.S. at 238. See also *Griffin v. Breckenridge*, 403 U.S. 88, 95-96 (1971) (overruling *Collins v. Hardyman*, 341 U.S. 651 (1951), "in light of the evolution of decisional law in the years that have passed"); *Moragne v. State Marine Lines*, 398 U.S. 375 (1970) (overruling *The*

*Harrisburg*, 119 U.S. 199 (1886), because it is "sharply out of keeping with the policies of modern American maritime law"); *James v. United States*, 366 U.S. 213, 217-222 (1961), overruling *Comm'r of Internal Revenue v. Wilcox*, 327 U.S. 404 (1946), because *Wilcox* was "thoroughly devitalized" by subsequent decisions); cf. *Rasul v. Bush*, 542 U.S. 466, 479 (2004) ("Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of Section 2241 jurisdiction over petitioners' claims.").

Federal policy regarding the employment of undocumented aliens is far more prohibitive today than it was when *Sure-Tan* was decided.[2] This Court acknowledged in *Sure-Tan* that it was "counterintuitive" (467 U.S. at 892) to recognize undocumented aliens as employees under the NLRA. Nonetheless, it reached that result because the majority concluded that the employment of illegal aliens was only "a peripheral concern" under the then-applicable immigration laws. Today's standards are not as lax as those that applied in 1984, and it is appropriate for this Court to determine now whether the *Sure-Tan* decision is still good law.

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[2] Indeed, the Postville, Iowa, plant owned by petitioner in this case was raided on May 12, 2008, by agents of the Bureau of Immigration and Customs Enforcement and 390 workers were arrested as illegal immigrants and criminally prosecuted.

## III.

## THE PREMISES ON WHICH THIS COURT DECIDED *SURE-TAN* ARE NO LONGER VALID

The Solicitor General argued in the NLRB's brief in the *Sure-Tan* case that "application of the National Labor Relations Act to undocumented aliens is consistent with and furthers the purposes of the Immigration and Nationality Act" because "the INA does not make it unlawful for an employer to hire an alien who is present or working in the United States without authorization." Brief for the National Labor Relations Board, No. 82-945, pp. 17, 18. When *Sure-Tan* was decided, not only was there no explicit provision in federal law prohibiting the employment of illegal aliens, but the Solicitor General's brief pointed out that the governing statute contained a "carefully considered" provision that excluded "employment" and "the usual and normal practices incident to employment" from the prohibited conduct of "harboring" an undocumented alien. *Id.* at 18. See *De Canas v. Bica*, 424 U.S. 351, 356-357 (1976).

Two Justices on the *Sure-Tan* Court – Justices Powell and Rehnquist – nonetheless concluded that the term "employees" in the NLRA did not include illegal alien workers. 467 U.S. at 913. The Court majority acknowledged that it was "counterintuitive" – even under the then-prevailing law – to treat undocumented aliens as "employees" for purposes of the NLRA. 467 U.S. at 892. But the majority said: "For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an

employer to hire an alien who is present or working in the United States without appropriate authorization." 467 U.S. at 892-893. On this basis, this Court's majority concluded "that enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA." 467 U.S. at 893.

The underlying premise – *i.e.*, that no law prohibits the employment of illegal aliens – has been reversed in the quarter century since the *Sure-Tan* decision. In 1986, Congress enacted IRCA, which, in the most explicit terms, declares in the title to 8 U.S.C. § 1324a(a) that the new federal law was "[m]aking employment of unauthorized aliens unlawful." The remainder of the Section specifies in great detail how this new federal policy is to be implemented. Consequently, it is no longer true that defining "employee" in the NLRA to include illegal aliens is consistent with federal immigration law.

The established legal maxim – "cessante ratione, cessante ipsa lex" – applies in these circumstances. The rationale for interpreting "employee" broadly to include illegal aliens no longer exists. In fact, federal policy today clearly militates against such an inclusive definition of "employee" and supports the opposite result – *i.e.*, invalidating the choice made by workers who are illegal aliens. If the votes of illegal workers are counted in union elections, unions may have an incentive to encourage illegal aliens to conceal their undocumented status and take jobs in plants that are not organized so as to secure a vote favorable to the union.

## IV.

## THIS COURT RECOGNIZED IN THE *HOFFMAN PLASTIC COMPOUNDS* CASE THAT CURRENT FEDERAL LAW DIFFERS FROM FEDERAL POLICY IN 1984

In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), this Court held that the federal policy expressed in 1986 in IRCA barred the award of back pay to illegal aliens who prevail in an NLRB proceeding. The Court said "that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." 535 U.S. at 151. The same conclusion applies to the present case.

The policy issues presented by this case were foreshadowed during the oral argument in *Hoffman Plastic Compounds*. Government counsel was asked whether permitting an award of backpay would not encourage unions to organize undocumented aliens (Transcript of Oral Argument, No. 00-1595, January 15, 2002, pp. 34-35):

> QUESTION: Well, when the board makes its calculus and when the Government made its calculus, did it give any consideration to the fact that a union ought not as a matter of policy to use illegal aliens for organizing activity, or do you think the union can do that?
>
> MR. WOLFSON: Well ---

QUESTION: Is it consistent with the labor laws of the United States for the union to say it knowingly uses an alien for organizing activity?

MR. WOLFSON: I don't know that the board has addressed the point of knowingly using illegal aliens. I do know that the board has concluded that undocumented aliens may be included within the bargaining unit, and indeed, in both Sure-Tan – in Sure-Tan itself I believe they were included in the bargaining unit.

QUESTION: And that doesn't induce illegal immigration?

MR. WOLFSON: Well ---

QUESTION: It seems to me that's a far more direct link than the very tenuous idea that you have that there's going to be more illegal immigration because they know they're going to get back pay. Here, what you're saying is that a union can, I suppose even knowingly, use illegal aliens on the workforce to organize the employer, knowing that by doing that the alien will still be entitled to back pay. That seems to me completely missing from any calculus, from any equitable calculus in your brief. I just --- and since it's a more direct link, I'm quite puzzled by it.

This Court said in its *Hoffman Plastic Compounds* opinion that the issue presented by that case had to be approached "through a wider lens, focused as it must be on a **legal landscape now significantly changed**." 535 U.S. at 147 (emphasis added). The Court held that "[u]nder the IRCA regime, it is impossible for an undocumented alien to obtain

employment in the United States without some party directly contravening explicit congressional policies." 535 U.S. at 148. Consequently, the Court held, "awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer. Therefore, as we have consistently held in like circumstances, the award lies beyond the bounds of the Board's remedial discretion." 535 U.S. at 149.

## V.

## FEDERAL APPELLATE JUDGES ARE LOOKING TO THIS COURT AS THE ONLY TRIBUNAL THAT CAN DETERMINE WHETHER ITS *SURE-TAN* DECISION APPLIES TODAY

This is not a case in which this Court can await future rulings in various Circuits and see whether there is a split in the Circuits before authoritatively deciding whether its *Sure-Tan* decision is still good law and should be applied by the NLRB. As Judge Henderson noted in her concurrence, federal appellate judges feel bound to apply a holding such as this Court's 1984 decision until this Court formally advises that the precedent should not be followed. Consequently, Circuit Judges cannot be expected to invoke their own considered judgment on the central legal issue so long as *Sure-Tan* remains a binding precedent.

In response to Agri's petition for rehearing en banc in the Court of Appeals, the NLRB urged the Court of Appeals not to rehear the case, and it relied on the

fact that there is "controlling Supreme Court precedent" that only this Court may alter. Response of the National Labor Relations Board in Opposition to Petition for Rehearing and Petition for Rehearing En Banc, D.C. Cir., Nos. 06-1329, 06-1349, pp. 4-5.

Since there are now more than 11 million undocumented aliens in the United States, the validity of their votes in union elections is a question that is likely to recur and affect representation under the NLRA across the country. It is desirable that any uncertainty about the validity of their votes be resolved at the earliest possible opportunity.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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June 30, 2008

# APPENDIX

# APPENDIX A

## UNITED STATES COURT OF APPEALS

### FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Docket No. Nos. 06-1329, 06-1349

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AGRI PROCESSOR CO., INC.,

*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

Argued: October 19, 2007
Decided: January 4, 2008

Rehearing En Banc Denied April 1, 2008*

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Before: HENDERSON, TATEL, and KAVANAUGH, Circuit Judges.

TATEL, Circuit Judge:

A company whose workers recently voted to unionize refuses to bargain with them, claiming that most of those who voted are undocumented aliens. The company argues that undocumented aliens are prohibited from unionizing because they do not qualify as "employees" protected by the National

Labor Relations Act. Because the company's argument ignores both the Act's plain language and binding Supreme Court precedent, we deny its petition for review.

I.

Petitioner Agri Processor Co. is a wholesaler of kosher meat products based in Brooklyn, New York. In September 2005, the company's employees voted to join the United Food and Commercial Workers union. When the company refused to bargain, the union filed an unfair labor practice charge with the National Labor Relations Board.

The Board's General Counsel issued a complaint charging that Agri Processor's refusal to bargain violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 151-169, which make it "an unfair labor practice for an employer-(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [the Act]; ... [or] (5) to refuse to bargain collectively with the representatives of his employees." *Id.* § 158(a)(1), (5). In a hearing before an administrative law judge, the company claimed that after the election it put the Social Security numbers given by all the voting employees into the Social Security Administration's online database and discovered that most of the numbers were either nonexistent or belonged to other people. Based on this evidence, the company*3 alleged that most of the workers who had voted in the election were aliens unauthorized to work in the United States. Arguing that undocumented workers do not count as "employees" protected by the NLRA, the company claimed the election was invalid. The company also asserted that undocumented aliens

may not belong to the same bargaining unit as legal workers, rendering improper the bargaining unit created by the Board.

Relying on Supreme Court precedent and the Board's decision in *Concrete Form Walls, Inc.*, 346 N.L.R.B. No. 80 (Apr. 13, 2006), the ALJ rejected the company's arguments, sustained the charged violations, and ordered Agri Processor to bargain with the union. *Agri Processor Co.*, 347 N.L.R.B. No. 107, at 3 (Aug. 31, 2006). The Board unanimously adopted the ALJ's recommendations. *Id.* at 1. Though one Board member noted that "the average person" might find it peculiar that an employer must bargain with illegal aliens, he acknowledged that the NLRA compelled this result. *Id.* at 1 n. 2.

The company petitions for review, still arguing that undocumented aliens are not employees under the NLRA and may not belong to the same bargaining unit as legal workers. The Board cross-petitions for enforcement.

II.

[1] According to the Board, Agri Processor's contention that undocumented aliens are not "employees" protected by the NLRA ignores the Act's plain language and the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). We agree.

The NLRA defines the term "employee" expansively and lists only a few limited exceptions:

> The term "employee" shall include any employee ..., but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or

> any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act ..., or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3). In *Sure-Tan*, the Supreme Court held that this definition clearly includes undocumented aliens:

> The breadth of [the NLRA's] definition [of "employee"] is striking: the Act squarely applies to "any employee." The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. *See* 29 U.S.C. § 152(3). Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of "employee."

467 U.S. at 891-92, 104 S.Ct. 2803 (emphasis added).

Remarkably, Agri Processor's brief neither acknowledges this controlling language in *Sure-Tan* nor even quotes the NLRA's definition of "employee." Instead, the company focuses exclusively on the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359, which made it illegal for companies knowingly to employ undocumented aliens, 8 U.S.C. § 1324a(a)(1), and on *4 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002),

which held that IRCA bars the Board from awarding backpay to undocumented aliens. Though Agri Processor never articulates this clearly, its argument seems to be that IRCA, passed after *Sure-Tan*, somehow amended the NLRA to exclude undocumented aliens from its coverage, and that *Hoffman Plastic* overruled *Sure-Tan*. In fact, however, neither IRCA nor *Hoffman Plastic* supports the company's argument.

[2] [3] To begin with, nothing in IRCA's text alters the NLRA's definition of "employee." NLRA section 2(3), 29 U.S.C. § 152(3), continues to define "employee" exactly the same way it did when the *Sure-Tan* Court held that "undocumented aliens ... plainly come within the broad statutory definition of 'employee.' " 467 U.S. at 892, 104 S.Ct. 2803. Thus, Agri Processor must be arguing that IRCA and the NLRA conflict, requiring us to read IRCA as implicitly repealing the NLRA's definition of "employee" to the extent that it includes undocumented aliens. But "where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 133-34, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)). Thus, courts should not infer that one statute has partly repealed another "unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary ... in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, --- U.S. ----, 127 S.Ct. 2518,

2532, 168 L.Ed.2d 467 (2007) (citations and internal quotation marks omitted). Neither condition is even arguably met here. Because IRCA nowhere states that undocumented aliens no longer qualify as employees under the NLRA, it does not "expressly contradict the original act." And IRCA has meaning without being read as partly repealing the NLRA: it prohibits employers from hiring undocumented aliens, which would otherwise be legal. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (citations and internal quotation marks omitted)).

[4] Moreover, "[a]mendments by implication, like repeals by implication, are not favored," *United States v. Welden*, 377 U.S. 95, 102 n. 12, 84 S.Ct. 1082, 12 L.Ed.2d 152 (1964), "and will not be found unless an intent to repeal [or amend] is 'clear and manifest.' " *Rodriguez v. United States*, 480 U.S. 522, 524, 107 S.Ct. 1391, 94 L.Ed.2d 533 (1987) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939)). Here, not only is there no clear indication that Congress intended IRCA implicitly to amend the NLRA, but all available evidence actually points in the opposite direction. The House Judiciary Committee Report on IRCA is clear:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards,

> labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, *5 the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan Inc. v. NLRB*, 467 U.S. 883 [104 S.Ct. 2803, 81 L.Ed.2d 732] (1984)[,] application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."

H.R.Rep. No. 99-682, pt. 1, at 58 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. Similarly, the House Education and Labor Committee Report says that no provision of IRCA

> limit[s] the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-

> productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

*Id.* pt. 2, at 8-9, *as reprinted in* 1986 U.S.C.C.A.N. 5757, 5758. These two passages are the only places in IRCA's legislative history where Congress discussed the NLRA. Rather than showing that IRCA was "clear[ly] and manifest [ly]" intended to amend the NLRA's definition of "employee," *Rodriguez*, 480 U.S. at 524, 107 S.Ct. 1391, they show precisely the opposite.

Perhaps Agri-Processor is arguing that in making it unlawful for employers to hire undocumented aliens, Congress must have intended to end job protections for such workers, even though it never said as much anywhere in IRCA's text or history. But this hardly follows, for it is quite possible that even as Congress barred employers from hiring undocumented aliens, it still intended for the NLRA to apply to such aliens. The *Sure-Tan* Court explained: "Application of the NLRA [to illegal aliens] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893, 104 S.Ct. 2803. And "[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened." *Id.*

In sum, there is absolutely no evidence that in passing IRCA Congress intended to repeal the NLRA to the extent its definition of "employee" includes

undocumented aliens. Thus, the NLRA's plain language, as applied by the Supreme Court in *Sure-Tan*, continues to control after IRCA, as the Seventh, Ninth, and Eleventh Circuits have all held. *See NLRB v. Concrete Form Walls, Inc.*, 225 Fed.Appx. 837 (11th Cir.2007) (upholding the NLRB's conclusion in *Concrete Form Walls*, 346 N.L.R.B. No. 80, that undocumented workers remain statutory employees under the NLRA after IRCA); *NLRB v. Kolkka*, 170 F.3d 937, 941 (9th Cir.1999) (holding that the NLRA continues to define undocumented aliens as employees after IRCA); *6 *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir.1992) (same); *cf. Patel v. Quality Inn S.*, 846 F.2d 700, 704-05 (11th Cir.1988) (rejecting the claim that IRCA implicitly amended the Fair Labor Standards Act's definition of "employee"). No circuit court has reached a contrary conclusion.

The dissent, instead of attempting to show implied repeal under the Supreme Court's established rules for doing so, creates its own rule. It claims we should read IRCA as implicitly amending the NLRA not because of anything Congress said in IRCA's text or history, but rather because of something the *Sure-Tan* Court said two years before IRCA's enactment in a passage Agri Processor never cites. Specifically, after the *Sure-Tan* Court held that "undocumented aliens ... plainly come within the [NLRA's] broad statutory definition of 'employee,' " 467 U.S. at 892, 104 S.Ct. 2803, it went on to explain why it found no conflict between its holding and then-existing immigration law. The Court said that because the law at that time did not bar hiring undocumented aliens, "there [wa]s no reason to conclude" that immigration law conflicted with the NLRA's

protection of such employees. *Id.* at 893, 104 S.Ct. 2803. According to the dissent, this passage means that once IRCA made it unlawful to hire undocumented aliens, immigration law had to conflict with the NLRA's broad definition of "employee." *See* Dissenting Op. at 10-11. But this does not logically follow, as an example illustrates: "Because it's not cold outside, it's not snowing. It is now cold outside, therefore it must be snowing." *See* Patrick J. Hurley, A Concise Introduction to Logic 323 (9th ed.2005) (explaining the fallacy of denying the antecedent, in which a person reasons from a statement phrased as "because not p, not q," that once p happens q will necessarily follow). The dissent claims its reading of this passage is necessary to prevent it from being "entirely meaningless." Dissenting Op. at 12. But the *Sure-Tan* majority had an obvious reason for including the passage that is far more plausible than the dissent's theory that the Court was *holding* how it would treat a hypothetical immigration statute not before it: to refute the *Sure-Tan* dissent's claim that then-existing immigration law precluded reading the NLRA as applying to undocumented aliens. *See Sure-Tan*, 467 U.S. at 913, 104 S.Ct. 2803 (Powell, J., dissenting).

More fundamentally, even if the Supreme Court had said immigration law would inevitably conflict with the NLRA's definition of "employee" if hiring undocumented aliens became unlawful, the Court never explained *how it would resolve* such a conflict. And rather than applying the Supreme Court's rule for determining whether two statutes irreconcilably conflict so that we must read the later as implicitly repealing the earlier, the dissent reverses the rule,

stating: "if Congress in [passing IRCA] wished to say that illegal immigrant workers ... [remain] 'employees' protected by the NLRA, it would have said so in the text of IRCA." Dissenting Op. at 14. Thus, instead of making "repeals by implication ... disfavored," *Reg'l Rail*, 419 U.S. at 133, 95 S.Ct. 335, and demanding that "the intention of the legislature to repeal ... be clear and manifest," *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936), the dissent presumes repeal because Congress never expressly declared that it wanted to avoid an implied repeal-all because of one paragraph from *Sure-Tan* the dissent misreads. But the Supreme Court "ha [s] never held that Congress must speak with different gradations of clarity depending on the specific circumstances of the relevant legislation." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). The dissent's rule *7 would lead to the absurd result that the Supreme Court-or any court for that matter-could alter the plain meaning of future legislation simply by announcing what current legislation does not mean.

Of course, the dissent is correct that "[w]hen the Supreme Court has issued a statutory decision and Congress then acts to change the relevant law, it flouts congressional will for a lower court to ignore the new statute and rely reflexively on the result of the old Supreme Court case." Dissenting Op. at 12. But this principle has no application here because Congress never "change [d] the relevant law." As we have shown above, IRCA neither explicitly nor implicitly amended the NLRA. Thus, this case is nothing like the examples the dissent cites in which the Supreme Court interpreted a statute and

Congress later amended *that statute*. *See id.* at 12. In those examples, Congress obviously overturned the Supreme Court's decisions-it expressly changed the statutory provision the Court had interpreted to achieve the opposite result. By contrast, after the *Sure-Tan* Court read the plain language of the NLRA's definition of "employee" to cover undocumented aliens, Congress did not change the NLRA to "expressly exempt[ ]" undocumented aliens from its coverage. *Sure-Tan*, 467 U.S. at 892, 104 S.Ct. 2803. Instead, Congress changed immigration law, never even hinting it intended to amend the NLRA. Congress's decision not to amend the NLRA's definition of "employee" is all the more striking given that it has previously amended that definition when it disagreed with the Supreme Court's interpretation of the Act. *See* Labor Management Relations Act, 1947, Pub.L. No. 80-101, § 2(3), 61 Stat. 136, 137-38 (amending the NLRA's definition of "employee" to exclude independent contractors and supervisors, whom the Supreme Court had held covered under the original version of the Act in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131-32, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), and *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-90, 67 S.Ct. 789, 91 L.Ed. 1040 (1947), respectively); *see also Kimbrough v. United States*, --- U.S. ----, 128 S.Ct. 558, 571, 169 L.Ed.2d 481 (2007) ("Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to [address the question at issue] in express terms.").

The dissent also criticizes our use of legislative history. But because IRCA, by its terms, does not amend the NLRA, it is the dissent that-at least under the Supreme Court's rules for implied repeal-

must find in IRCA's history "clear and manifest" legislative intent to amend the NLRA. *Rodriguez*, 480 U.S. at 524, 107 S.Ct. 1391. We cite legislative history only to demonstrate how far Agri Processor and the dissent are from meeting this standard. Thus, *Shannon v. United States*, 512 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994), upon which the dissent relies, has nothing to do with this case. There the Court refused to "abandon altogether the text of the statute" in order to "give effect to [a] snippet of legislative history." *Id.* at 583, 114 S.Ct. 2419. Here, by contrast, we hew closely to the text of the NLRA and IRCA, while the dissent seeks to "abandon [it] altogether."

Returning now to Agri Processor's arguments, we think the company's reliance on *Hoffman Plastic* is entirely misplaced. In that case, the Supreme Court addressed only what remedies the Board may grant undocumented aliens when employers violate their rights under the NLRA. Nowhere in *Hoffman Plastic* did the Court hold that IRCA leaves undocumented aliens altogether unprotected by the NLRA. Indeed, the Court explicitly declined to revisit *Sure-Tan*'s holding that undocumented aliens are employees under *8 the NLRA, 535 U.S. at 149 n. 4, 122 S.Ct. 1275, and said that remedies other than backpay-such as cease and desist orders-can still be imposed for NLRA violations committed against undocumented aliens, *see id.* at 152, 122 S.Ct. 1275. Thus, neither IRCA nor *Hoffman Plastic* alters the NLRA's definition of "employee" as applied by the Supreme Court in *Sure-Tan*.

[5] Even were we less certain about the meaning of *Hoffman Plastic* and IRCA, we would still reach the same result. First, if we thought that *Hoffman*

*Plastic*'s reasoning cast some doubt on *Sure-Tan*'s clear holding-which we don't-we would still follow *Sure-Tan*, for as the Supreme Court held in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989): "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* at 484, 109 S.Ct. 1917. *Sure-Tan*, not *Hoffman Plastic*, "directly controls" this case.

Second, even were it unclear whether the NLRA's definition of "employee" included undocumented aliens-which it isn't-we would still defer to the Board's decision to include them. "Since the task of defining the term 'employee' is one that 'has been assigned primarily to the [Board],' the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." *Sure-Tan*, 467 U.S. at 891, 104 S.Ct. 2803 (quoting *Hearst*, 322 U.S. at 130, 64 S.Ct. 851). Including undocumented aliens within the meaning of "employee" is entirely reasonable because "extending the coverage of the [NLRA] to such workers is consistent with the Act's avowed purpose of encouraging and protecting the collective-bargaining process." *Id.* at 892, 104 S.Ct. 2803. Leaving undocumented workers without the NLRA's protections would "create[ ] a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining." *Id.*

Finally, Agri Processor suggests that if neither *Hoffman Plastic* nor IRCA requires the result it seeks, we should still rule in its favor "in light of the recent policy changes and debate over the burden of illegal immigration in this country." Pet'r's Opening Br. 32. Given *Sure-Tan* and the NLRA's broad definition of "employee," however, the company must make this argument to Congress, not this court.

III.

[6] This brings us to Agri Processor's second argument-that the Board may not place undocumented aliens and legal workers in the same bargaining unit. NLRA section 9(b) "vests in the Board authority to determine 'the unit appropriate for the purposes of collective bargaining.' " *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494, 105 S.Ct. 984, 83 L.Ed.2d 986 (1985) (quoting 29 U.S.C. § 159(b)). "[I]n defining bargaining units, [the Board's] focus is on whether the employees share a 'community of interest.' " *Id.* at 494, 105 S.Ct. 984. The community of interests test turns "on the interests of employees as employees, not their interests more generally." *Speedrack Prods. Group, Ltd. v. NLRB*, 114 F.3d 1276, 1280 (D.C.Cir.1997). The Board, moreover, has "broad discretion in making unit determinations, and its unit determinations are accorded particular*9 deference by a reviewing court." *Id.* at 1278.

Agri Processor argues that undocumented aliens and legal workers lack a community of interest in two respects. First, the company argues that "[t]he incorporation of the undocumented workers with otherwise lawful and eligible workers as members of the bargaining unit ... caused the votes of the eligible

workers to become diluted, resulting in the disenfranchisement of the bargaining unit's lawful and eligible workers." Pet'r's Opening Br. 33. As we have already explained, however, undocumented aliens qualify as employees under the NLRA, so their votes are just as valid as those of legal workers.

Second, Agri Processor maintains that because undocumented aliens have no legitimate expectation of continued future employment, their interests differ from those of legal employees. But as the Board explains:

> [U]ndocumented workers' fear of detection and termination does not prevent them from sharing a community of interest with their coworkers. That fear is counterbalanced by a hope of continuing their employment indefinitely, giving them a similar expectation of future employment as 'regular' at-will employees who hold their jobs at the whim of their employers.

Resp't's Br. 21. The Board also correctly points out that "expected tenure is not necessarily dispositive of the community-of-interest inquiry." *Id.* Indeed, the Board has previously approved-and we have upheld-allowing workers to vote even when, at the time of the election, the workers knew they would soon leave for another job. *See, e.g., Saint-Gobain Indus. Ceramics, Inc. v. NLRB*, 310 F.3d 778, 782-83 (D.C.Cir.2002).

Furthermore, "the focus of the community of interests test is on the interests of employees as employees, not their interests more generally." *Speedrack*, 114 F.3d at 1280. Thus, "to determine if a community of interest exists," the Board typically looks at "the similarity of wages, benefits, skills,

duties, working conditions, and supervision of the employee." *Id.* at 1278. With regard to each of these factors, undocumented workers and legal workers in a bargaining unit are identical. While undocumented aliens may face penalties for violating immigration laws, they receive the same wages and benefits as legal workers, face the same working conditions, answer to the same supervisors, and possess the same skills and duties.

In short, Agri Processor has failed to show that the interests of undocumented workers *as employees* differ in any way from those of legal workers. Indeed, the company has come nowhere close to making the type of showing needed to overcome the high degree of deference we owe the Board's unit determinations.

IV.

For the reasons stated above, we deny Agri Processor's petition for review and grant the Board's cross-petition for enforcement.

SO ORDERED.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring:

It seems "somewhat peculiar" indeed, as Board Member Kirsanow observed, to order an employer "to bargain with a union representing employees that the [employer] would be required to discharge under the Immigration Reform and Control Act, 8 U.S.C. § 1324a." *Agri Processor Co.*, 347 N.L.R.B. No. 107, at 1 n. 2 (2006). Moreover, as the dissent makes clear, it is hard to ignore *Sure-Tan*'s reliance on the absence of any provision in the Immigration*10 and

Naturalization Act making it "a separate criminal offense for an alien to accept employment after entering this country illegally," *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), and the fact that, shortly thereafter, the Congress enacted IRCA, which does precisely that. Nonetheless, *Sure-Tan* concluded that the broad statutory definition of "employee" in the NLRA does not exclude an illegal immigrant and we must follow *Sure-Tan*'s interpretation until the Supreme Court otherwise directs or the Congress expressly limits the term's scope. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Accordingly, I join the majority opinion.

KAVANAUGH, Circuit Judge, dissenting:

Their immigration status apparently unbeknownst to their employer, illegal immigrant workers voted in a union election and affected the election's outcome. The employer later discovered that the workers were illegal; terminated them as required by federal immigration law; and sought to overturn the tainted union election. The NLRB ruled that the union election must stand because illegal immigrant workers are "employees" under the National Labor Relations Act and thus are entitled to vote in union elections. The majority opinion agrees.

I respectfully dissent. The result reached by the majority opinion not only is "somewhat peculiar," as Judge Henderson acknowledges, but also is inconsistent with Supreme Court precedent and the Immigration Reform and Control Act of 1986. As the Supreme Court has explained, the term "employee"

in the NLRA must be interpreted in conjunction with the immigration laws. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). Applying the *Sure-Tan* analysis, I would hold that an illegal immigrant worker is not an "employee" under the NLRA for the simple reason that, ever since 1986, an illegal immigrant worker is not a lawful "employee" in the United States. I would therefore vacate the Board's order and remand for the Board to determine how a party can challenge a union election or certification upon discovering after the fact that illegal immigrant workers voted in the election and affected the outcome.

* * *

In 1984, the Supreme Court considered whether an employer committed an unfair labor practice by reporting illegal immigrant workers to immigration officials in response to the workers' union activity. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). In an opinion by Justice O'Connor, the Court explained that the NLRA's definition of "employee" must be interpreted in conjunction with the immigration laws. *Id.* at 892-93, 104 S.Ct. 2803. The Court then held that illegal immigrant workers were "employees" covered by the NLRA because-"[c]ounterintuitive though it may be"-the immigration laws *as they stood* in 1984 did not prohibit employment of illegal immigrant workers. *Id.* at 892, 104 S.Ct. 2803. The Court stated:

> For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.... Moreover, Congress

> has not made it a separate criminal offense for an alien to accept employment after entering this country illegally. *Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA*, there is *11 no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.

*Id.* at 892-93, 104 S.Ct. 2803 (emphasis added and citation omitted).

As I read the decision, the Court in *Sure-Tan* thus applied a straightforward analytical framework to govern the question whether illegal immigrant workers are "employees" under the NLRA. If federal law does not prohibit employment of illegal immigrant workers, then the workers can be "employees" under the NLRA. If on the other hand federal law prohibits employment of illegal immigrant workers, then the workers are not "employees" under the NLRA.[1]

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[1] In *Sure-Tan*, Justice Powell and Justice Rehnquist dissented, arguing that even without a specific congressional prohibition against employing illegal immigrant workers, it is "unlikely that Congress intended the term 'employee' to include-for purposes of being accorded the benefits of that protective statute [the NLRA]-persons wanted by the United States for the violation of our criminal laws." *Sure-Tan*, 467 U.S. at 913, 104 S.Ct. 2803 (Powell, J., concurring in part and dissenting in part). The *Sure-Tan* majority reasoned, however, that a congressional prohibition on employment of illegal immigrants was necessary in order to conclude that illegal immigrant workers were not "employees" under the NLRA. As a result of passage of the Immigration Reform and Control Act in 1986, of course, such a prohibition now exists.

When it decided *Sure-Tan* in 1984, the Court was well aware of the significance of tying the NLRA's definition of "employee" to the immigration laws' prohibition or non-prohibition on employment of illegal immigrant workers. The Court decided *Sure-Tan* in the midst of an intense congressional debate on immigration legislation. At oral argument in *Sure-Tan*, moreover, one of the Justices asked a direct question about proposed legislation banning employment of illegal immigrant workers. *See* Transcript of Oral Argument, *Sure-Tan*, 467 U.S. 883, 104 S.Ct. 2803 (No. 82-945), *available at* http:// www. oyez. org/ cases (Court: "There is legislation pending in Congress to make it illegal, to make it an unlawful act, a crime to hire an undocumented alien."). And just five days before the Court issued its decision, the House of Representatives passed a bill to prohibit the employment of illegal immigrants. *See* 130 Cong. Rec. 12,794-95 (June 20, 1984). It would defy credulity to suggest that the Supreme Court either was unaware of the significance of its discussion of immigration law or intended it to be meaningless.

Two years after *Sure-Tan*, as the Court had foreshadowed, Congress passed and President Reagan signed a comprehensive immigration bill that prohibited employment of illegal immigrant workers. The landmark Immigration Reform and Control Act of 1986, known as IRCA, "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (internal quotation marks and alteration omitted). Under IRCA, it is now a criminal and civil violation for an

employer to knowingly hire an illegal immigrant. Pub.L. No. 99-603, § 101, 100 Stat. 3359, 3360 (codified as amended at 8 U.S.C. § 1324a). If an employer hires a worker and later discovers that the worker is in the United States illegally, the employer must fire the worker immediately. 8 U.S.C. § 1324a(a)(2). And federal law provides that an employee may not use fraudulent identification documents in completing the immigration forms that are required to be employed in the United States. 8 U.S.C. § 1324c(a).

*12 IRCA "significantly changed" the "legal landscape" that had existed in *Sure-Tan*. *Hoffman*, 535 U.S. at 147, 122 S.Ct. 1275; *see also Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir.1998) (en banc) (IRCA brought about "monumental change" in immigration law). Applying the straightforward *Sure-Tan* analysis in the wake of IRCA, I would hold that an illegal immigrant worker is not an "employee" under the NLRA because Congress has now made it illegal for illegal immigrants to be employed.

The majority opinion and the Board rely on the result in *Sure-Tan*. *See* Maj. Op. at 2-3; Board Br. at 12-13. But *Sure-Tan* explained that the interpretation of "employee" depends on the status of the immigration laws. 467 U.S. at 892-93, 104 S.Ct. 2803. Congress then changed those immigration laws in 1986. When the Supreme Court has issued a statutory decision and Congress then acts to change the relevant law, it flouts congressional will for a lower court to ignore the new statute and rely reflexively on the result of the old Supreme Court case. Relying on *Sure-Tan*'s pre-IRCA interpretation of "employee" is roughly like relying on *District of*

*Columbia v. Carter* to dismiss a § 1983 suit against a D.C. police officer even though Congress later changed the statute to provide that such suits are cognizable under § 1983. *Compare Carter*, 409 U.S. 418, 432-33, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), *with* Pub.L. No. 96-170, § 1, 93 Stat. 1284, 1284 (1979) (amending 42 U.S.C. § 1983). Or relying on *Hubbard v. United States* to hold that 18 U.S.C. § 1001 does not prohibit false statements in judicial proceedings even though Congress later changed the statute to provide otherwise. *Compare Hubbard*, 514 U.S. 695, 715, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995), with Pub.L. No. 104-292, § 2, 110 Stat. 3459, 3459 (amending 18 U.S.C. § 1001). Or relying on *Westfall v. Erwin* to limit federal employees' immunity from suit even though Congress later passed the Westfall Act to ensure such immunity. Compare Westfall, 484 U.S. 292, 300, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), with Pub.L. No. 100-694, §§ 2, 5-6, 102 Stat. 4563, 4563-65 (amending 28 U.S.C. § 2679).[2]

Turning next to a logic textbook, the majority opinion contends that *Sure-Tan* is not as clear as it could have been on how the NLRA's coverage of "employees" would be affected by a change in the immigration laws. *See* Maj. Op. at 6. But we

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[2] The doctrine of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), has no application in this case. That doctrine instructs lower courts not to assume that a Supreme Court decision implicitly overruled one of the Court's prior precedents. In this case, however, we are not considering whether a Supreme Court decision implicitly overruled an earlier Supreme Court decision. Rather, we are considering the effect of a *congressional change* in the governing law.

nonetheless have to decide whether the *better* reading of *Sure-Tan* is that the NLRA's coverage of illegal immigrant workers as "employees" (i) depends on whether illegal immigrant workers may be lawfully employed in the United States; or (ii) does not depend on whether illegal immigrant workers may be lawfully employed in the United States. In my judgment, the first reading-that the NLRA's coverage of illegal immigrant workers as "employees" depends on whether illegal immigrant workers may be lawfully employed in the United States-is far and away the better interpretation of *Sure-Tan*. After all, under the majority opinion's reading, *Sure-Tan*'s discussion of the interaction of the NLRA and the immigration laws would be entirely meaningless. *See* 467 U.S. at 892-93, 104 S.Ct. 2803. I *13 am reluctant to reach that conclusion about Supreme Court decisions; I am especially reluctant to do so here given that the Supreme Court was well aware of the significance of its opinion in light of the congressional proposals on illegal immigration then being considered and debated.

The majority opinion also refers to the plain language of the NLRA. *See* Maj. Op. at 2-3. But according to the Supreme Court, that's only half the equation. The other half of the equation is the plain language of the immigration laws. *Sure-Tan* established that the NLRA's definition of "employee" is not to be considered in isolation, but rather in conjunction with the immigration laws and whether those laws prohibit the employment of illegal immigrants. *See* 467 U.S. at 892-93, 104 S.Ct. 2803. Since 1986, federal law has contained just such a prohibition. The majority opinion would be correct if

the Supreme Court in *Sure-Tan* had said something like "we interpret the NLRA's definition of 'employee' without regard to a worker's employment status under the immigration laws." In fact, the Supreme Court said just the opposite.[3]

The majority opinion and the Board imply that *Hoffman* reaffirmed *Sure-Tan*. *See* Maj. Op. at 4, 7-8; *Agri Processor Co.*, 347 N.L.R.B. No. 107, at 3 (2006); *see also Concrete Form Walls, Inc.*, 346 N.L.R.B. No. 80, at 4 (2006). That is incorrect. The *Hoffman* Court did not hold that, after IRCA, illegal immigrant workers are still "employees" under the NLRA. Rather, the *Hoffman* Court stated that it was not addressing the "employee" issue. *See* 535 U.S. at 150 n. 4, 122 S.Ct. 1275 ("Our first holding in *Sure-Tan* is not at issue here ...."); *see also* Brief of Petitioner at 17, *Hoffman*, 535 U.S. 137, 122 S.Ct. 1275 (No. 00-1595), 2001 WL 1729616 (raising remedial issues and not challenging whether illegal immigrant worker was an "employee" under the NLRA). If anything, the language of the *Hoffman* opinion is more consistent with a conclusion that illegal immigrant workers are not employees under the NLRA. After all, *Hoffman* made clear that, in the

---

[3] According to the majority opinion, we cannot read the NLRA's coverage of "employees" to be affected by the immigration laws because that would suggest that the immigration laws implicitly repealed the NLRA, which courts do not lightly find. *See* Maj. Op. at 4. With respect, the majority opinion's discussion of the repeal-by-implication doctrine is a sideshow because the Supreme Court has already taken the step that the majority opinion here criticizes. In *Sure-Tan*, the Court explained that the immigration laws can affect the NLRA's coverage of employees and that a prohibition on employment of illegal immigrant workers means they are not employees under the NLRA. *See* 467 U.S. at 892-93, 104 S.Ct. 2803.

wake of IRCA, illegal immigrant workers are not entitled to any remedies under the NLRA, such as reinstatement or back pay, even when unfair labor practices are committed against them. 535 U.S. at 151-52, 122 S.Ct. 1275. The *Hoffman* Court explained that providing illegal immigrant workers with remedies under the NLRA "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Id.* at 151, 122 S.Ct. 1275.

The majority opinion also relies on two House committee reports issued in connection with IRCA. *See* Maj. Op. at 4-5. The usual cautions apply to this kind of legislative history: Committee reports are highly manipulable, often unknown by most Members of Congress and by the President, and thus ordinarily unreliable as an expression of statutory "intent." Committee reports are not passed by the House and Senate and presented to the President, as required by the Constitution in order to *14 become law. *See* U.S. Const. art. I, § 7; *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) ("[J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members-or, worse yet, unelected staffers and lobbyists-both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."). The two committee reports cited by the majority opinion here, moreover, are from "one House of a politically divided Congress"-the same category of legislative history that the *Hoffman* Court rejected. 535 U.S. at 149 n.

4, 122 S.Ct. 1275. Indeed, one of the reports cited by the majority opinion is the exact same report that the *Hoffman* Court dismissed as a "rather slender reed." *Id.* at 149-50 n. 4, 122 S.Ct. 1275.

In considering the majority opinion's legislative history argument, it bears emphasis that the Court in *Sure-Tan* had stated that the NLRA's definition of "employee" depends on whether Congress prohibits employment of illegal immigrants. Given that analysis, Congress was necessarily aware that prohibiting employment of illegal immigrants could affect the NLRA's coverage of illegal immigrant workers. Indeed, someone on Capitol Hill in 1986 knew that IRCA, analyzed in light of *Sure-Tan*, could remove illegal immigrant workers from the NLRA's definition of "employee," because one of the committee reports purports to say that IRCA would not affect *Sure-Tan*'s holding. The problem is that this committee report is "in no way anchored in the text" of IRCA, and we thus cannot rely on it. *Shannon v. United States*, 512 U.S. 573, 583, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994). As Justice Kennedy has explained for the Court, legislative materials can have a role in statutory interpretation "only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.*, 545 U.S. at 568, 125 S.Ct. 2611 (emphasis added). In a circumstance similar to this case, the Supreme Court flatly rejected a committee report that attempted to preserve a prior judicial precedent, stating that reliance on the report would have required the Court to "abandon altogether the text of the statute as a guide in the interpretative process." *Shannon*, 512 U.S. at 583, 114 S.Ct. 2419. So too here. In light of

*Sure-Tan*, if Congress in 1986 wished to say that illegal immigrant workers are prohibited from being employees in the United States but nonetheless are "employees" protected by the NLRA, it would have said so in the text of IRCA.

Contrary to the suggestion in the majority opinion, since IRCA only one other court of appeals has analyzed this issue in an opinion; it reached the same conclusion as the majority opinion here. *See NLRB v. Kolkka*, 170 F.3d 937 (9th Cir.1999); Maj. Op. at 5-6. But the Ninth Circuit's decision did not grapple with the Supreme Court's analysis in *Sure-Tan* and how IRCA applies under that analysis. I thus disagree with and would not follow the Ninth Circuit's decision.

* * *

Applying *Sure-Tan* and *Hoffman* in the wake of IRCA, I would hold that an illegal immigrant worker is not an "employee" under the NLRA. I would vacate the Board's order upholding the union election because the Board's order rested on the incorrect conclusion that illegal immigrant workers are "employees" under the NLRA. This particular case involves a union election and thus does not affect or *15 involve the illegal immigrant workers themselves because they no longer work for the employer (the law prohibits their employment) and because the Supreme Court has already held that illegal immigrant workers are not entitled to any remedies under the NLRA. *See Hoffman*, 535 U.S. at 151-52, 122 S.Ct. 1275. But the question whether these illegal immigrant workers' votes should count in the union election-the particular issue in this case-is still important to (i) the legal workers, whose

votes may have been diluted or overridden in the union election by the votes of illegal immigrant workers, and (ii) the employer, who may have to bargain with a union that would not have been certified but for the votes of the illegal immigrant workers. I would remand for the Board to address how a party may challenge a union election or certification upon discovering after the fact that illegal immigrant workers voted in the election and affected the outcome.

# APPENDIX B

National Labor Relations Board
Division of Judges
New York Branch Office

AGRI PROCESSOR CO., INC.
AND
LOCAL 342, UNITED FOOD AND COMMERCIAL WORKERS UNION

Case No. 29-CA-27396
JD(NY)-18-06
Brooklyn, NY

May 10, 2006

## DECISION

### Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on April 25, 2006. The charge was filed on January 30, 2006 and the Complaint was issued on March 21, 2006. In substance, the Complaint alleged that after the Union had been certified by the Board, the Respondent has refused to bargain.

The Respondent's defense boils down to the claim that a majority of the people who voted in the election "were subsequently found to be illegal aliens" and therefore the election should be declared a nullity because (a) the Union never had a valid showing of interest and (b) the illegal aliens, comprising most of the voting unit were not legally

permitted to work for the Company and therefore could not share a community of interest with those employees who legally could be employed.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

## Findings and Conclusions

### I. Jurisdiction

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. Unfair Labor Practices

The Union filed its Petition for an election on August 24, 2005. On September 7, 2005, the parties executed a Stipulated Election Agreement that was approved by the Regional Director on September 8, 2005. The parties agreed that the unit was as follows:

**Included**: All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators employed by the Employer at its facility at 5600 1st Avenue, Brooklyn, New York.

**Excluded**: All managers, office and clerical employees, salesmen, truck drivers, guards and supervisors as defined in Section 2(11) of the Act.

The election was held on September 23, 2005 and the tally of ballots showed that 15 employees cast ballots

for the Union and that five employees cast ballots against union representation. There was one challenged ballot but that was not determinative.

On September 30, 2005, the Employer filed timely Objections alleging that union representatives and/or agents engaged in conduct affecting the results of the election.

On November 10, 2005, the Regional Director issued a Report on Objections in which he overruled some but ordered that some other of the allegations to be sent to a hearing. To the extent that the Regional Director held that certain of the Objections were not meritorious, those conclusions were adopted by the Board on December 21, 2005.

On December 16, 2005, I issued a Decision on Objections wherein I overruled those Objections that were sent to a hearing. I recommended that the appropriate Certification be issued to the Union.

The Respondent filed Exceptions to my Decision, but on January 11, 2006, the Board, by its Associate Executive Secretary, dismissed the Exceptions because they were untimely filed.

On January 23, 2006, the Board issued a Certification of Representative to the Union.

The Union has made various demands for bargaining commencing on January 5, 2006 and continuing to date. The Respondent has refused to commence bargaining and indicated on the record that it would not do so.

At the hearing, I rejected the Respondent's defenses but permitted it to make an offer of proof. In essence, the Respondent offered to prove, (and offered exhibits in support of its contentions), that a

majority of the employees who were employed at the time of the election had submitted to the employer social security cards, (along with Resident cards); and that upon a post election check at a Social Security Web site, the Respondent discovered that these individuals either did not have social security numbers or that the numbers that they had submitted to the employer did not match the numbers listed with the Social Security Administration. The Respondent therefore opines that this shows that these individuals were undocumented aliens, having no permission to work legally in the United States. When asked if the Respondent had any other proof of their status, the Respondent's Counsel said that he did not.

In my opinion, the Respondent reliance on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) is misplaced. In *Hoffman*, the Court merely held that the Board may not award backpay to undocumented workers because that would run "counter to the policies underlying IRCA, policies the Board has no authority to enforce or administer." The Court did not hold that such individuals should not be construed to be employees within the meaning of the Act or that Employers could interfere with their Section 7 rights with impunity.

In *Concrete Form Walls, Inc.*, 346 NLRB No. 80 (2006), the Board rejected the Employer's contention that it could legally discharge employees because they were undocumented aliens. The Board also held that these individuals were valid voters in a Board election. Finally the Board concluded that the mere fact that the Employer offered evidence to show that the employees' social security numbers did not match those in the Social Security Data Base, was

not sufficient to show that they were illegally working in the country.

## Conclusions of Law

1. By refusing to bargain with Local 342, United Food and Commercial Workers Union, the Respondent has violated Section 8(a)(1) & (5) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

## The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To insure that the bargaining unit employees will be accorded the services of their collective bargaining representative for the full period provided by law, I shall recommend that the initial one year period of certification commence on the date the Respondent commences to bargain in good faith with the Union. See *Mar-Jac Pultry Company, Inc.*, 136 NLRB 785.

The General Counsel and the Charging Party request that the Board order the Respondent to pay for their legal expenses in contesting this case. They assert that this is justified because the Respondent's defenses are frivolous. Citing *Unbelievable Inc., d/b/a Frontier hotel & Casino*, 318 NLRB 857 (1995). Without commenting on the Respondent's defenses, I note that the hearing in this case took less than an hour and that the preparation for the hearing would have amounted to the drafting of the Complaint, the copying of a number of documents

and the reading of a few cases. I suspect that the total amount of time expended by either the General Counsel or the Charging Party's Counsel to litigate this case could not have amounted to more than several hours. Since, the legal expenses for this amount of time is essentially nominal, I do not think that an award of legal expenses would be justified.[1]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

## ORDER

The Respondent, Agri Processor Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 342, United Food & Commercial Workers Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the

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[1] Although Ms. McConnel's pay rate may or may not exceed the General Counsel's attorney, it is hard for me to imagine that the legal cost to the Union could be anything other than nominal.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facilities in the Brooklyn, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2006.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. May 10, 2006

Raymond P. Green
Administrative Law Judge

## APPENDIX

## NOTICE TO EMPLOYEES

**Posted by Order of the National Labor Relations Board**

**An Agency of the United States Government**

***1* The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.**

**FEDERAL LAW GIVES YOU THE RIGHT TO**

**Form, join, or assist a union**

**Choose representatives to bargain with us on your behalf**

**Act together with other employees for your benefit and protection**

**Choose not to engage in any of these protected activities**

**WE WILL NOT** refuse to bargain collectively with Local 342, United Food & Commercial Workers Union as the exclusive bargaining representative of our employees.

**WE WILL NOT** like or related manner interfere with restrain or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

**WE WILL** on request, bargain with the Union as the exclusive representative of the employees in the certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

**AGRI PROCESSOR CO., INC.**

**(Employer)**

**Dated** _____ **By** __

**(Representative)**

**(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.

## APPENDIX C

## UNITED STATES COURT OF APPEALS

### FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 06-1329 September Term, 2007

NLRB-29CA27396

Filed On: April 1, 2008

Agri Processor Co., Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 06-1349

BEFORE: Henderson, Tatel, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of petitioner's petition for panel rehearing filed on February 19, 2008, and the response thereto, it is

ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT

Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 06-1329 September Term, 2007

NLRB-29CA27396

Filed On: April 1, 2008

Agri Processor Co., Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

Consolidated with 06-1349

BEFORE: Sentelle, *• Chief Judge, and Ginsburg, Henderson, Randolph, * Rodgers, Tatel, Garland, Brown, Griffith, and Kavanaugh, * Circuit Judges

ORDER

Petitioner's petition for rehearing en banc and response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor

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• Chief Judge Sentelle and Circuit Judges Randolph and Kavanaugh would grant the petition for rehearing en banc.

of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT

Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail

Deputy Clerk

# OPPOSITION BRIEF

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Supreme Court, U.S.
FILED
OCT 16 2008
OFFICE OF THE CLERK

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No. 08-21

# In the Supreme Court of the United States

AGRI PROCESSOR CO., INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that undocumented workers are employees under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), as this Court held in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984).

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# In the Supreme Court of the United States

No. 08-21

AGRI PROCESSOR CO., INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 514 F.3d 1. The decision and order of the National Labor Relations Board (Board) (App., *infra*, 1a-15a) is reported at 347 N.L.R.B. No. 107.

## JURISDICTION

The judgment of the court of appeals was entered on January 4, 2008. A petition for rehearing was denied on April 1, 2008 (Pet. App. 40a-42a). The petition for a writ of certiorari was filed on June 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The National Labor Relations Act (NLRA) defines "employee" to "include any employee" not expressly excluded. NLRA § 2(3), 29 U.S.C. 152(3). The definition then provides that "employee" does not include agricultural laborers, domestic servants, individuals employed by a parent or spouse, independent contractors, supervisors, and persons whose employers fall under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, or otherwise are excluded from the NLRA. See NLRA § 2(3), 29 U.S.C. 152(3); *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984).

For decades, the National Labor Relations Board has concluded that the term "employee" includes workers who are undocumented aliens, and this Court has held that both "[t]he terms and [the] policies of the [NLRA] fully support the Board's interpretation." *Sure-Tan*, 467 U.S. at 891; see *id.* at 891 n.5 (tracing the history of the Board's interpretation). The Court explained in *Sure-Tan* that the statutory definition is "striking" in its breadth and that undocumented aliens do not fit within any of the statute's few exceptions. *Id.* at 891. Undocumented aliens therefore "plainly come within the broad statutory definition of 'employee.'" *Id.* at 892.

This Court also noted that the Board's interpretation was consistent with the NLRA's purpose. The NLRA seeks to "encourag[e] and protect[] the collective-bargaining process." *Sure-Tan*, 467 U.S. at 892. Excluding employees who are undocumented aliens from that process, the court explained, would "create[] a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby erod-

ing the unity of all the employees and impeding effective collective bargaining." *Ibid.*

Finally, the Court observed that it "d[id] not find any conflict" between the Board's interpretation of the term "employee" and the immigration laws. *Sure-Tan*, 467 U.S. at 892. Nothing in the immigration laws "ma[de] it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Id.* at 892-893. The Court also noted that "[a] primary purpose [of the immigration laws] is to preserve jobs for American workers," and that "[a]pplication of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." *Id.* at 893. Application of the NLRA thus serves to diminish the incentive to hire illegal aliens, and thereby to diminish the incentive for the aliens themselves to enter the United States in violation of federal immigration laws. *Id.* at 893-894.

The Court noted, however, that the Board's authority to award *remedies* to undocumented alien "employees" could be limited by federal immigration policy. *Sure-Tan*, 467 U.S. at 902-903 & n.12. In particular, the Court held that reinstatement and backpay remedies must be conditioned on the employee's lawful admission to the country. *Ibid.* "[A] potential conflict with the [Immigration and Nationality Act] is thus avoided." *Id.* at 903.

Two years after this Court decided *Sure-Tan*, Congress enacted a new immigration statute that prohibits employers from hiring, or continuing to employ, any alien, knowing that he or she is not lawfully authorized to work in the United States. Immigration Reform and

Control Act of 1986 (IRCA), Pub. L. No. 99-603, sec. 101(a)(1), § 274A(a)(1) and (h), 100 Stat. 3360, 3368 (codified as amended at 8 U.S.C. 1324a(a)(1) and (h)). In light of those amendments, the Court subsequently held that the Board cannot award backpay to undocumented aliens. See *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 147-151 (2002). The Court stated, however, that employers would not "get[] off scot-free" for NLRA violations against alien employees. *Id.* at 152. The Court recognized that the Board could and did impose "other significant sanctions" for violations of the NLRA, such as a cease-and-desist order enforceable by contempt. *Id.* at 152; see also *Sure-Tan*, 467 U.S. at 904 n.13.

2. a. Petitioner, a meat wholesaler, operates a facility in Brooklyn, New York. In August 2005, a local of the United Food and Commercial Workers Union (Union) requested an election to represent a unit of petitioner's employees. Petitioner and the Union stipulated to the scope of the proposed bargaining unit and agreed that an election would be held in September 2005. Pet. App. 2a, 31a. Petitioner's employees voted for union representation by a margin of 15 to 5. *Id.* at 31a-32a. After resolving petitioner's objections to the conduct of the election, the Board certified the Union as the collective-bargaining representative of petitioner's employees. *Id.* at 32a. Petitioner refused to bargain with the Union. *Ibid.*

b. The Board's General Counsel issued a complaint, alleging that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1). Pet. App. 2a. At a hearing before an administrative law judge (ALJ), petitioner did not dispute that it had refused to bargain with the Union, but defended entirely

on the ground that the undocumented status of a number of its employees rendered the election void and relieved petitioner of any obligation to bargain. *Id.* at 30a, 32a-33a. Petitioner had used the Social Security Administration's online database to check the validity of the voting employees' Social Security numbers after the election, apparently for the first time. *Id.* at 2a, 33a. Based on the result of that online check, petitioner offered to prove that most of the numbers either did not exist or belonged to other people. *Id.* at 32a-33a. Petitioner contended that most of its workers who had voted in the election were undocumented, that undocumented aliens do not qualify as "employees" within the meaning of the NLRA, and that the election was therefore invalid. *Id.* at 2a. Petitioner urged that this Court's decision in *Hoffman* compelled the conclusion that undocumented workers no longer come within the statutory term "employee."

The ALJ rejected that defense and found that petitioner had violated the NLRA as charged. He applied the Board's position that the scope of the NLRA's protection encompasses illegal aliens. Pet. App. 33a (citing *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831 (2006), enf'd, 225 Fed. Appx. 837 (11th Cir. 2007)). Although petitioner contended that *Hoffman* had changed the law, the ALJ concluded that *Hoffman* considered only whether undocumented aliens are eligible for particular remedies, not the antecedent question whether they may be considered "employees within the meaning of the [NLRA]." *Ibid.* The ALJ also noted the Board's ruling in *Concrete Form Walls* that non-matching Social Security numbers were not in any event sufficient evidence to prove that the employees were illegally working in the United States. Pet. App. 33a-34a.

c. The Board affirmed. App., *infra*, 1a-5a. The panel adopted the ALJ's order in pertinent part. See *id.* at 2a nn.2-3.

Member Kirsanow joined the decision in full, but added a brief additional explanation. Although he acknowledged that treating aliens as employees even when IRCA forbids their employment "may reasonably be seen as somewhat peculiar by the average person," that outcome was "compelled by Sec. 2(3)'s broad definition of 'employees,'" which the Board "is powerless to change." App., *infra*, 2a n.2. That, he said, "is the province of Congress." *Id.* at 3a n.2.

3. The court of appeals enforced the Board's order. Pet. App. 1a-17a.

a. The court of appeals began with the plain language of the NLRA, as construed in *Sure-Tan*. The court concluded that this Court had held that the NLRA's definition of "employee" "clearly includes undocumented aliens," and that that holding was "controlling" here. Pet. App. 4a.

The court then concluded that nothing in IRCA explicitly "alters the NLRA's definition of 'employee,'" which is the same as it was when this Court decided *Sure-Tan*. Pet. App. 5a. Nor, the court held, did IRCA implicitly repeal the broad language on which this Court had relied in *Sure-Tan*. The court applied the longstanding principle that one statute will not be read to repeal another by implication unless "such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all." *Ibid.* (quoting *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007)). The enactment of IRCA does not require such a reading, the court concluded, because nothing in IRCA directly con-

tradicts the NLRA, and IRCA "has meaning without being read as partly repealing the NLRA: it prohibits employers from hiring undocumented aliens, which would otherwise be legal." *Id.* at 6a.

Indeed, the court of appeals noted, "all available evidence actually points" away from an implied repeal. Pet. App. 6a. First, Congress was plainly aware of *Sure-Tan*, but in adopting IRCA it "did not change the NLRA to 'expressly exempt[]' undocumented aliens from its coverage. Instead, Congress changed immigration law, never even hinting that it intended to amend the NLRA." *Id.* at 12a (quoting *Sure-Tan*, 467 U.S. at 892) (citation omitted; brackets in original). Second, under other circumstances Congress has expressly amended the NLRA's definition of "employee" to overrule this Court's interpretation of that term. *Ibid.* Third, the only references to the NLRA or the Board in the entire legislative history of IRCA point to the conclusion that Congress did not intend implicitly to amend the NLRA. Thus, the court noted both the House Judiciary Committee's explanation in its report that "the employer sanctions provisions *are not intended to limit in any way the scope of the term 'employee'* in Section 2(3)," and the committee's endorsement of the observation in *Sure-Tan* that NLRA coverage "helps to [protect] the wages and employment conditions of lawful residents." *Id.* at 7a (quoting H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. 1, at 58 (1986) (*House Report*)) (emphasis added); accord *id.* at 7a-8a (citing *House Report*, Pt. 2, at 8-9). Finally, the court noted that every other circuit to consider the question has concluded that the definition of "employee" upheld in *Sure-Tan* still controls. *Id.* at 9a (citing cases from the Seventh, Ninth, and Eleventh Circuits).

The court of appeals acknowledged that *Sure-Tan* had relied in part on the absence of any immigration law expressly barring employers from hiring illegal aliens. But it does not follow, the court stated, that this Court had intended that its holding in *Sure-Tan* would cease to have effect if Congress ever enacted such a law. Rather, the Court had merely sought to refute the contentions by two dissenting Justices in *Sure-Tan* that then-existing immigration law precluded a reading of the NLRA as applying to undocumented aliens. Pet. App. 10a. Nor, the court of appeals continued, did the Court in *Sure-Tan* state how it would resolve any conflict with the immigration laws should one be found to arise at a later date. *Ibid.*

Finally, the court of appeals rejected petitioner's argument that *Hoffman* had changed the relevant law. Because this Court in *Hoffman* "explicitly declined to revisit *Sure-Tan*'s holding that undocumented aliens are employees under the NLRA," but rather addressed only what *remedies* are available to such undocumented employees, the court of appeals concluded that *Sure-Tan* remained controlling and that *Hoffman* was simply not relevant to this case. Pet. App. 13a (citing *Hoffman*, 535 U.S. at 149 n.4).

The court of appeals thought that the relevant statutory language, as interpreted in *Sure-Tan*, was sufficiently clear to dispose of this case. But the court also noted that "the task of defining the term 'employee' is one that has been assigned primarily to the [Board]," and that "the Board's construction of that term is entitled to considerable deference" and will be upheld if it is "reasonably defensible." Pet. App. 14a (quoting *Sure-Tan*, 467 U.S. at 891) (internal quotation marks omitted). The court concluded that the Board's interpreta-

tion of "employee" is "entirely reasonable" and therefore entitled to deference, particularly in light of the NLRA's central purpose of "protecting the collective-bargaining process." *Ibid.* (quoting *Sure-Tan*, 467 U.S. at 892).

b. Judge Henderson joined the court's opinion, but concurred separately to echo Member Kirsanow's observation that the result seems "somewhat peculiar." Pet. App. 17a (quoting App., *infra*, 2a n.2).

c. Judge Kavanaugh dissented. Pet. App. 18a-29a. In his view, this Court's *Sure-Tan* opinion required the term "employee" to be construed according to the following "analytical framework": "If federal law does not prohibit employment of illegal immigrant workers, then the workers can be 'employees' under the NLRA. If on the other hand federal law prohibits employment of illegal immigrant workers, then the workers are not 'employees' under the NLRA." *Id.* at 20a. Under Judge Kavanaugh's view of the *Sure-Tan* holding, Congress's enactment of IRCA meant that illegal aliens ceased to be "employees" under the NLRA. See *id.* at 24a. He therefore would have "remand[ed] for the Board to address how a party may challenge a union election or certification upon discovering after the fact that illegal immigrant workers voted in the election and affected the outcome." *Id.* at 29a.

4. The court of appeals denied rehearing en banc by a vote of 7 to 3. See Pet. App. 41a-42a.

## ARGUMENT

The court of appeals correctly sustained the National Labor Relations Board's interpretation of the term "employee" in Section 2(3) of the National Labor Relations Act. The Board's interpretation is the same as this

Court's in *Sure-Tan*; Congress did not amend the NLRA when it enacted IRCA two years later; the Board has consistently interpreted Section 2(3) in the same manner over the 22 years since IRCA's enactment; and the court of appeals' decision sustaining the Board's interpretation in this case is consistent with the decisions of the other courts of appeals that have addressed the question. Against this firmly settled background, review by this Court is not warranted.

1. As an initial matter, petitioner fails to acknowledge that this case turns (as *Sure-Tan* did) on an agency's interpretation of a term in the statute that the agency administers. When this Court ratified the Board's inclusive definition of "employee" in *Sure-Tan*, it relied principally on the "striking" breadth of Section 2(3), which does not include undocumented workers among its few express exemptions. Petitioner does not identify any error in that analysis or suggest that *Sure-Tan* was incorrect when decided. The narrow question presented in this case, therefore, is whether Congress, by enacting IRCA, implicitly amended the NLRA's definition of "employee," and did so with such clarity as to remove the Board's customary authority to interpret its organic statute. The Board has reasonably concluded that it did not, and the courts of appeals have unanimously sustained the Board's position. *NLRB* v. *Kolkka*, 170 F.3d 937, 940-941 (9th Cir. 1999); accord *NLRB* v. *Concrete Form Walls*, 225 Fed. Appx. 837 (11th Cir. 2007);[1] see also *Del Rey Tortilleria, Inc.* v.

[1] Concrete Form Walls argued to the Eleventh Circuit that aliens are not "employees." See Br. for Resp. at 10-14, *Concrete Form Walls*, *supra* (Nos. 06-13845, 06-14997); see also *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831, 833-834 & n.15 (2006). The Eleventh Circuit summarily agreed with the Board's rejection of that argument.

*NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (noting that IRCA's legislative history "endorses" *Sure-Tan*'s holding that the Board permissibly treated undocumented aliens as employees).

a. The sound textual basis for the Board's interpretation remains unchanged. Congress did not add an exception to the NLRA for undocumented aliens, or change Section 2(3) in any way, when it enacted IRCA (or any subsequent immigration statute, see p. 16, *infra*). Petitioner contends (Pet. 11) that IRCA demonstrates a change in federal policy and that the applicable federal *law* must change with it, quoting the common-law maxim *cessante ratione, cessante ipsa lex*—"the reason of the law ceasing, the law itself ceases." *Rogers* v. *Tennessee*, 532 U.S. 451, 474 (2001) (Scalia, J., dissenting) (tracing the principle's history at common law). But as Justice Stevens has noted, the judiciary does not apply that principle to statutes that remain on the books, even if they may seem outmoded to the courts: "The maxim that *cessante ratione legis, cessat et ipsa lex*, applicable to the common law, does not govern the judiciary in cases involving application of positive law." *TWA* v. *Franklin Mint Corp.*, 466 U.S. 243, 273 (1984) (dissenting opinion). Section 2(3) remains on the books, unamended by Congress, just as it read at the time of *Sure-Tan*.

The dissenting judge in the court of appeals suggested that Congress had changed the NLRA, as authoritatively construed by this Court in *Sure-Tan*, without actually changing its text. In the dissent's view, the absence of any prohibition on employing illegal aliens was necessary to the holding in *Sure-Tan*, and when such a prohibition was enacted, the holding of *Sure-Tan* ceased to have force. But the Board has permissibly

concluded that the dissent's premise is incorrect. First, although the Court examined the relationship between the NLRA and federal immigration policy as an indicator of congressional intent, it did so only after examining the text of the NLRA. IRCA did not change that text, and because IRCA has independent force without reference to the NLRA, there is no reason to think that Congress meant to amend the NLRA without saying so. Second, the fact that employing illegal aliens was not independently unlawful was sufficient to show the *absence* of a conflict between labor and immigration law, but as the court of appeals explained, the enactment of IRCA does not mean that there *is* a conflict.

b. In fact, after IRCA, as before, there is no direct conflict between labor law and immigration law in this respect that would justify the courts' overriding the Board's judgment. As the court of appeals concluded, a congressional intent to bar the employment of aliens illegally present in the United States is not inconsistent with a congressional intent to protect the working conditions of *all* workers an employer has chosen to hire, through universal application of federal labor laws. Pet. App. 8a. The latter goal is a core purpose of the NLRA. As this Court explained in *Sure-Tan*, the willingness of undocumented workers to accept below-market terms of employment "can seriously depress" the employment conditions of legal workers, undermining employee unity and consequently interfering with the collective-bargaining process. 467 U.S. at 892 (quoting *De Canas* v. *Bica*, 424 U.S. 351, 356-357 (1976)); accord *Kolkka*, 170 F.3d at 941 (agreeing, in an election case, that *Sure-Tan*'s inclusive interpretation of "employee" "buttresses rather than conflicts with the purposes of the IRCA").

Enforcement of the NLRA's prohibition against unfair labor practices even as they affect employees who are not lawfully present in the United States does not render those workers' employment legal. Rather, the inclusive definition of "employee" merely prevents employers from violating the NLRA with impunity with respect to workers employed (either consciously or unknowingly) in violation of IRCA. As the Court recognized in *Sure-Tan*, excluding undocumented aliens from the definition of "employee" would "create[] a subclass of workers" outside the protection of the bargaining unit. 467 U.S. at 892. The Board could reasonably conclude that Congress would not have wanted to permit employers to benefit from their own violation of IRCA's employment provision—in the context of this case, to invalidate a union election after the fact, for the price of as little as $250 per alien in civil penalties under IRCA. See Immigration and Nationality Act § 274A(e)(4)(A), 8 U.S.C. 1324a(e)(4)(A).

Any doubt concerning the reasonableness of the Board's conclusion is dispelled by IRCA's legislative history, which makes clear that Congress did *not* intend to overturn the result in *Sure-Tan* and remove undocumented aliens from coverage under the NLRA altogether. See p. 7, *supra*; Pet. App. 6a-8a.

Accordingly, petitioner's generalized contentions that the United States currently hosts more immigrants and that its immigration laws are less forgiving than at the time of *Sure-Tan* do not demonstrate that the Board was unreasonable in continuing to harmonize these two well-supported policy goals in applying the text of the NLRA that Congress left unchanged. See, *e.g.*, *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987) (the Board's interpretation is entitled to judi-

cial deference if its view is "rational and consistent with the [NLRA]").

Nor does *Hoffman* undermine the recognition in *Sure-Tan* that including under the NLRA the undocumented workers an employer has chosen to hire safeguards the rights of *other*, lawfully employed workers. *Hoffman*'s limited concern was that a specific NLRA remedy—awarding backpay to undocumented aliens who were the targets of unlawful discrimination under the NLRA—would contravene federal immigration policy and encourage future immigration violations, particularly given that the NLRA requires victims to mitigate damages and, hence, to seek further (illegal) work during the backpay period. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 149-151 (2002). *Hoffman* thus established that the Board may not award *individuals* a particular remedy—backpay—that might encourage aliens illegally present in the United States to seek unlawful employment or, as petitioner contends (Pet. 12-13), encourage unions to use such aliens in organizing efforts.

At the same time, *Hoffman* also highlighted that the Board retains the authority to impose "other significant sanctions" when an employer violates the NLRA in its dealings with its employees, including its undocumented employees. Those remedies include requiring the employer to cease and desist from violations (on pain of contempt), which does not confer any incentive for employees to seek further unlawful employment. 535 U.S. at 152. As harmonized in *Sure-Tan* and *Hoffman*, federal labor policy and immigration policy thus simultaneously protect the labor rights of the workforce generally while creating disincentives to immigration violations by both workers and employers.

c. Because the operative statutory text remains unchanged, and because the Board's definition of "employee" is not contrary to federal immigration policy, this case presents no occasion for the Court to re-examine a longstanding statutory-interpretation precedent. *Stare decisis* has particular force in the context of statutory interpretation, particularly where—as here—Congress has legislated in the area for many years without altering the statute that this Court has interpreted. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756-757 (2008); accord *CBOCS W., Inc.* v. *Humphries*, 128 S. Ct. 1951, 1958 (2008).[2] Indeed, in *John R. Sand & Gravel*, this Court recently rejected an appeal to overrule a long-settled statutory interpretation based on "a turn in the course of the law" that (as the Court agreed) made the earlier statutory interpretation "anomalous." 128 S. Ct. at 756. (There, too, the claimant seeking to have this Court overrule settled law contended that the Court today should re-examine "the comparative weight Congress would likely have attached to competing legitimate interests." *Id.* at 756.) Moreover, the statute in *John R. Sand & Gravel* was a jurisdictional provision, which no federal agency had been vested with authority to interpret. Here, by contrast, the interpretation of the NLRA lies squarely within the Board's authority.

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[2] By contrast, in petitioner's principal case for departing from statutory stare decisis, Congress apparently had simply stood silent. *Boys Mkts., Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241-242 (1970). Moreover, in that case the Court was convinced by subsequent, dissonant developments in the law that its original statutory interpretation had been wrong from the beginning. See *id.* at 249, 254. Here, by contrast, petitioner does not dispute that *Sure-Tan* was correct as a matter of pre-IRCA law.

d. It is, of course, open to Congress to revise the NLRA as it sees fit to accommodate changes in immigration policy. Congress did not do so in IRCA, after *Sure-Tan* was decided. And Congress has not done so in the 22 years since IRCA was enacted, during which time the Board (sustained by the courts of appeals) has adhered to the interpretation upheld in *Sure-Tan*—even though Congress has enacted several significant reforms of the federal immigration laws during that period. See, *e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

2. Although the Board and the court of appeals properly rejected petitioner's statutory-interpretation contention on its merits, petitioner would be extremely unlikely to overturn the unfair-labor-practice finding even if the Board's interpretation of the term "employee" were incorrect. Under the Board's precedents, petitioner did not sufficiently substantiate a basis for disregarding the election results based on petitioner's assertion that some voting employees were illegal aliens.

The Board has sustained unfair-labor-practice charges against employers who were "content to violate the IRCA and employ workers whom [they] believed were illegal aliens until those workers decided to vote in a Board-conducted election." *Concrete Form Walls*, 346 N.L.R.B. at 835. In particular, Concrete Form Walls "apparently accepted [its employees' employment-verification] documents as facially valid when it placed these employees on its formal payroll and only questioned their veracity after the employees voted in the election." *Id.* at 834 n.18. That "11th-hour concern with complying with the IRCA" is inadequate, the Board reasonably concluded. *Id.* at 835.

In that case, the Board rejected as insufficient the same type of proffer that petitioner made here. The Board concluded that an employer "fail[s] to prove that * * * employees were, in fact, illegal aliens" when its offer of proof consists (as petitioner's does here, Pet. App. 33a) only of evidence that the aliens offered inaccurate Social Security numbers. 346 N.L.R.B. at 834; see *id.* at 835.

Accordingly, even if the Court were inclined to review the Board's continued adherence to the interpretation upheld as reasonable in *Sure-Tan*, it would only be appropriate to do so in a case in which an employer made an appropriate demonstration of employees' illegal status, rather than taking a "wait-and-see" approach to the outcome of a representation election. Cf. *Concrete Form Walls*, 346 N.L.R.B. at 834-835 (employer, charged with discharging employees in retaliation for voting for union representation, defended on the ground that it had discharged them because they were illegal aliens, but the Board concluded that the employer's asserted reason was a pretext).[3]

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[3] Moreover, petitioner did not argue before the Board that the results of its post-election investigation into its employees' immigration status warranted an exception to the usual certification-bar rule that an employer must bargain with a certified union for one year, notwithstanding any post-election loss of majority. See *Brooks* v. *NLRB*, 348 U.S. 96, 101-104 (1954) (noting that even during the one-year period, the Board may revoke certification or decline to pursue an unfair-labor-practice charge "if the facts warrant").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
*Solicitor General*

RONALD MEISBURG
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

JOHN H. FERGUSON
*Associate General Counsel*

LINDA DREEBEN
*Deputy Associate General Counsel*

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*Assistant General Counsel*

KIRA DELLINGER VOL
*Attorney*
*National Labor Relations Board*

OCTOBER 2008

## APPENDIX

NATIONAL LABOR RELATIONS BOARD,
WASHINGTON, D.C.

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Case No. 29-CA-27386

AGRI PROCESSOR CO., INC. AND LOCAL 342, UNITED FOOD AND COMMERCIAL WORKERS UNION

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Aug. 31, 2006

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## DECISION AND ORDER

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BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

On May 12, 2006, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided

to affirm the judge's rulings, findings,[1] and conclusion[2]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] With respect to the separate view of our colleague, we note that, unless and until the employees are declared to be illegal and are discharged and/or deported, they remain employees of the Respondent, they remain employees under the Act, they lawfully voted in the election that the Union won, and since the Union lawfully represents the bargaining unit, we do not think it "peculiar" to require the Respondent to bargain with the Union.

Member Kirsanow joins his colleagues in adopting the judge's conclusion that the Respondent has violated Sec. 8(a)(5) by refusing to bargain with the Charging Party Union, but would add the following observations. Relying on evidence that most of its unit employees presented social security numbers that do not match those in the Social Security Administration's records, the Respondent contends that these employees are illegal immigrants and that its refusal to bargain is justified by that fact. Whether or not the Respondent's employees are, in fact, working in the United States illegally is not an issue we need to address at this point. Assuming, however, that the Respondent's contention in this regard is correct, Member Kirsanow submits that an order compelling the Respondent to bargain with a union representing employees that the Respondent would be required to discharge under the Immigration Reform and Control Act, 8 U.S.C. § 1324a (IRCA), may reasonably be seen as somewhat peculiar by the average person. Nonetheless, he acknowledges that, as the Board recently explained in *Concrete Form Walls*, 346 NLRB No. 80, slip op. at 3-4 (2006), such an order is compelled by Sec. 2(3)'s broad definition of "employees." Setting aside the specifics of this case and speaking more generally, Member Kirsanow observes that although it may be more rational to resolve the tension between Sec. 2(3) and the IRCA in a manner that does not place employers in the position of having to bargain with a representative of workers not lawfully entitled to work, the Board's duty is to enforce the

and to adopt the Order as modified and set forth in full below.[3]

## ORDER

The National Labor Relations Board orders that the Respondent, Agri Processor Co. Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 342, United Food and Commercial Workers Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators, employed by the Employer at its facility located

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Act as written. It is powerless to change the meaning of Sec. 2(3). That is the province of Congress.

[4] We adopt the judge's recommendation that the initial certification year commence on the date that the Respondent begins to bargain in good faith with the Union. We shall substitute the Board's standard language for portions of the judge's recommended Order and notice.

at 5600 1st Avenue, Brooklyn, New York, excluding all managers, office and clerical employees, salesmen, truck drivers, guards, and supervisors as defined in Section 2(11) of the Act.

(b) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2006.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 31, 2006

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|---|---|
| Robert J. Battista | Chairman |
| Wilma B. Liebman | Member |
| Peter N. Kirsanow | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX [TO DECISION AND ORDER]

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NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 342, United Food & Commercial Workers Union as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms

and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators, employed by us at our facility located at 5600 1st Avenue, Brooklyn, New York, excluding all managers, office and clerical employees, salesmen, truck drivers, guards, and supervisors as defined in Section 2(11) of the National Labor Relations Act.

AGRI PROCESSOR CO., INC.

*Emily Desa, Esq.*, for the General Counsel.

*Richard M. Howard, Esq.* and *Jeffrey A. Meyer, Esq.*, for the Respondent.

*Patricia McConnell, Esq.*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York, on April 25, 2006. The charge was filed on January 30, 2006, and the complaint was issued on March 21, 2006. In substance, the complaint alleged that after the Union had been certified by the Board, the Respondent has refused to bargain.

The Respondent's defense boils down to the claim that a majority of the people who voted in the election "were subsequently found to be illegal aliens" and therefore the election should be declared a nullity because (a) the Union never had a valid showing of interest and (b) the illegal aliens, comprising most of the voting unit were not legally permitted to work for the Company and therefore could not share a community of interest with those employees who legally could be employed.

Based on the entire record, including my observations of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following

## FINDINGS AND CONCLUSIONS

### I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. UNFAIR LABOR PRACTICES

The Union filed its petition for an election on August 24, 2005. On September 7, 2005, the parties executed a Stipulated Election Agreement that was approved by the Regional Director on September 8, 2005. The parties agreed that the unit was as follows:

> Included: All full-time and regular part-time production and maintenance warehouse employees, including hi-lo drivers, loaders, pickers, checkers and forklift operators employed by the Employer at its facility at 5600 1st Avenue, Brooklyn, New York.
>
> Excluded: All managers, office and clerical employees, salesmen, truck drivers, guards and supervisors as defined in Section 2(11) of the Act.

The election was held on September 23, 2005, and the tally of ballots showed that 15 employees cast ballots for the Union and that 5 employees cast ballots against union representation. There was 1 challenged ballot but that was not determinative.

On September 30, 2005, the Employer filed timely objections alleging that union representatives and/or agents engaged in conduct affecting the results of the election.

On November 10, 2005, the Regional Director issued a Report on Objections in which he overruled some but ordered that some other of the allegations to be sent to a hearing. To the extent that the Regional Director held that certain of the objections were not meritorious, those conclusions were adopted by the Board on December 21, 2005.

On December 16, 2005, I issued a Decision on Objections wherein I overruled those objections that were sent to a hearing. I recommended that the appropriate certification be issued to the Union.

The Respondent filed exceptions to my decision, but on January 11, 2006, the Board, by its Associate Executive Secretary, dismissed the exceptions because they were untimely filed.

On January 23, 2006, the Board issued a certification of representative to the Union.

The Union has made various demands for bargaining commencing on January 5, 2006, and continuing to date. The Respondent has refused to commence bargaining and indicated on the record that it would not do so.

At the hearing, I rejected the Respondent's defenses but permitted it to make an offer of proof. In essence, the Respondent offered to prove (and offered exhibits in support of its contentions), that a majority of the employees who were employed at the time of the election had submitted to the employer social security cards (along with Resident cards); and that upon a postelection check at a social security website, the Respondent discovered that these individuals either did not have social security numbers or that the numbers that they had submitted to the employer did not match the num-

bers listed with the Social Security Administration. The Respondent therefore opines that this shows that these individuals were undocumented aliens, having no permission to work legally in the United States. When asked if the Respondent had any other proof of their status, the Respondent's counsel said that he did not.

In my opinion, the Respondent's reliance on *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) is misplaced. In *Hoffman*, the Court merely held that the Board may not award backpay to undocumented workers because that would run "counter to the policies underlying IRCA, policies the Board has no authority to enforce or administer." The Court did not hold that such individuals should not be construed to be employees within the meaning of the Act or that employers could interfere with their Section 7 rights with impunity.

In *Concrete Form Walls, Inc.*, 346 NLRB No. 80 (2006), the Board rejected the Employer's contention that it could legally discharge employees because they were undocumented aliens. The Board also held that these individuals were valid voters in a Board election. Finally the Board concluded that the mere fact that the Employer offered evidence to show that the employees' social security numbers did not match those in the social security database, was not sufficient to show that they were illegally working in the country.

## CONCLUSIONS OF LAW

1. By refusing to bargain with Local 342, United Food and Commercial Workers Union, the Respondent has violated Section 8(a)(1) & (5) of the Act.

2. The aforesaid violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To insure that the bargaining unit employees will be accorded the services of their collective-bargaining representative for the full period provided by law, I shall recommend that the initial 1-year period of certification commence on the date the Respondent commences to bargain in good faith with the Union. *See Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

The General Counsel and the Charging Party request that the Board order the Respondent to pay for their legal expenses in contesting this case. They assert that this is justified because the Respondent's defenses are frivolous. Citing *Frontier Hotel & Casino*, 318 NLRB 857 (1995). Without commenting on the Respondent's defenses, I note that the hearing in this case took less than an hour and that the preparation for the hearing would have amounted to the drafting of the complaint, the copying of a number of documents and the reading of a few cases. I suspect that the total amount of time expended by either the General Counsel or the Charging Party's counsel to litigate this case could not have amounted to more than several hours. Since, the legal expenses for this amount of time is essentially nominal, I do not think that an award of legal expenses would be justified.[1]

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[1] Although McConnell's pay rate may or may not exceed the General Counsel's attorney, it is hard for me to imagine that the legal cost to the Union could be anything other than nominal.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

## ORDER

The Respondent, Agri Processor Co., Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Local 342, United Food & Commercial Workers Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facilities in the Brooklyn, New York, copies of the attached notice marked "Appendix."[3] Copies of the no

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

tice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 23, 2006.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 12, 2006

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX [TO ALJ OPINION]

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Local 342, United Food & Commercial Workers Union as the exclusive bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the certified appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

AGRI PROCESSOR CO., INC.

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(3)

No. 08-21

Supreme Court, U.S.
FILED
OCT 3 1 2008
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

AGRI PROCESSOR CO., INC.,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

1. This case concerns the continuing vitality of a decision rendered by this Court in 1984 construing the term "employee" in the NLRA. That term does not, by its plain language, resolve the issue whether illegal aliens may vote in a union election. In 1984 this Court held that since there was then no federal law "making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization" (*Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883, 892-893 (1984)), the NLRB's view that illegal aliens are

"employees" – albeit "counterintuitive" – was "compatible" with federal immigration law.

That is no longer true. The 1986 amendment to the federal immigration laws has eradicated the premise on which a majority of this Court (with Justices Powell and Rehnquist dissenting) arrived at its 1984 decision. In its Brief in Opposition, the NLRB challenges our argument that this major shift in national policy warrants the overruling of the *Sure-Tan* decision, citing Justice Stevens' dissent in *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 273 (1984). Br. in Opp. 11. But *Franklin Mint* concerned the explicit and unambiguous terms of the Warsaw Convention of 1929, an international treaty that was still in effect when the *Franklin Mint* case was decided.

Petitioner is not asking this Court to declare that because of changed circumstances the plain terms of a treaty or statutory provision are unenforceable, as the plaintiff did in *Franklin Mint*. The issue in this case concerns not the implementation of explicit terms in a statute or treaty but the continued viability of a decision of this Court construing a broadly worded statutory term.

2. Consequently, the relevant precedents of this Court are cases in which this Court has overruled decisions construing federal statutes in light of policies or events that post-dated the statutes. See Pet. 8-9. This Court also recently held, in a unanimous opinion by Justice Stevens, that a 1988 amendment to the Patent Act that eliminated the

market power presumption in patent cases warranted overruling *International Salt Co. v. United States*, 332 U.S. 392 (1947), which had declared tying arrangements to be *per se* violations of the Sherman and Clayton Acts. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). The rationale of the *Illinois Tool Works* opinion and decision warrants re-examination of this Court's 1984 *Sure-Tan* decision.

3. The NLRB contends that this Court should give weight to the fact that "Congress did not add an exception to the NLRA for undocumented aliens, or change Section 2(3) [of the NLRA] in any way, when it enacted IRCA (or any subsequent immigration statute . . . .)." Br. in Opp. 11; see also Br. in Opp. 16. This Court has frequently cautioned, however, that it is "reluctant to draw inferences from Congress' failure to act." *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), *quoting from Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969).

The NLRB cannot point to any consideration by Congress, in 1986 or thereafter, whether to retain undocumented workers in the NLRA's definition of "employee" or whether to approve or disapprove of the NLRB policy that was enforced in *Sure-Tan* and that was applied by the NLRB in this case. Indeed, even if a statutory provision effectively overruling *Sure-Tan* had been considered and rejected by Congress, that history would not support the

conclusion that the *Sure-Tan* construction should be retained after enactment of the Immigration Reform and Control Act of 1986. "Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 546 U.S. 142, 147 (2005), *quoting from United States v. Craft*, 535 U.S. 274, 287 (2002), *quoting from Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). When, as in this case, there is not even a "failed legislative proposal," this Court's warning against drawing any inference from Congressional inaction follows *a fortiori*.

4. The NLRB also suggests that certiorari should be denied because petitioner allegedly took "a 'wait-and-see' approach to the outcome of a representation election" and the petitioner's asserted reason for refusing to bargain was a "pretext." Br. in Opp. 16-17. These factual allegations were not made before the NLRB, no findings regarding them appear in the record, and neither the NLRB nor the majority of the court below relied on such facts. They cannot, therefore, be invoked as an alternative ground for sustaining the judgments of the NLRB or of the court of appeals. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989); *Heckler v. Campbell*, 461 U.S. 458, 469 (1983); *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542 (1960).

5. Finally, the NLRB suggests that petitioner could have chosen to request, under *Brooks v. NLRB*, 348 U.S. 96, 101-104 (1954), that the union be decertified rather than refuse to bargain with it.

Br. in Opp. 17, n. 3. This, too, was not a ground argued or relied upon by the NLRB or the court of appeals. And, in any event, if, as petitioner contends, the employees who participated in the election were ineligible, the NLRB should have voided the election and not required petitioner to follow the avenue described in *Brooks*.

For the reasons stated in the Petition for a Writ of Certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2008